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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10-14-2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

KATHERINE MAJAUCKAS, a single)	1 CA-CV 09-0599
woman,)	
)	DEPARTMENT A
Plaintiff/Appellant,)	
)	MEMORANDUM DECISION
v.)	(Not for Publication -
)	Rule 28, Arizona Rules
KYLE DAVID ZALL,)	of Civil Appellate
)	Procedure)
Defendant/Appellee.)	
)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-029946

The Honorable John Rea, Judge

AFFIRMED

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Tempe

K E S S L E R, Presiding Judge

¶1 Appellant Katherine Majauckas ("Majauckas") appeals the trial court's decisions dismissing her complaint and denying

motions for new trial and to alter or amend judgment. The court granted Appellee Kyle David Zall's ("Zall") motion to dismiss for failure to state a claim upon which relief can be granted because the statute of limitations had expired for Majauckas to file her claim. Majauckas argues that the court erred by 1) holding that temporary absences from the state do not toll the statute of limitations; and 2) not converting Zall's motion to dismiss to a motion for summary judgment and not allowing Majauckas further discovery. We affirm the court's orders.

FACTUAL AND PROCEDURAL HISTORY

¶12 On November 16, 2006, the parties were involved in a car accident in which Zall allegedly drove his car into the rear end of another car, which in turn rear-ended Majauckas's car. On November 21, 2008, Majauckas filed a complaint in Maricopa County Superior Court alleging injuries from the accident.

¶13 Pursuant to Arizona Rule of Civil Procedure 12(b), Zall filed a motion to dismiss with prejudice for failure to state a claim upon which relief can be granted. Zall contended that Majauckas filed her complaint four days after the statute of limitations had expired.

¶14 In Majauckas's response, she argued that the court should deny the motion because there were factual issues regarding whether the court should toll the statute of limitations due to Zall's temporary absences from Arizona that

would have made the complaint timely. Specifically, Majauckas argued that in his deposition Zall stated he had left Arizona for at least six days during the time the statute of limitations was running. Zall did not state the specific dates that he was absent; rather, he stated periods of time, such as "two days" during spring break.¹ Majauckas attached the affidavit of a paralegal, who attested to the statements Zall made during the deposition. Majauckas also argued that Zall's motion to dismiss should be converted to a motion for summary judgment because the affidavit presented matters outside of the pleadings.

¶15 In response, Zall argued that his absences would only toll the statute of limitations if he could not be served with process during the absences. Zall contended that 1) there were no facts supporting, or even allegations made by Majauckas, that Zall left Arizona to avoid service; rather, Zall left Arizona on vacation; 2) Majauckas made no attempt to serve him within the statute of limitations period; and 3) Majauckas did not allege that she could not have served Zall within that time. Finally, Zall argued that the "four corners" of the complaint "clearly indicate" that the complaint was barred, and that Majauckas's

¹ The transcript of the deposition Majauckas submitted to the trial court and this Court is incomplete. The portions counsel provided show that Zall spoke in general terms about his temporary absences.

arguments in her response did not provide a basis for tolling the statute.

¶16 The court dismissed Majauckas's complaint with prejudice. In doing so, it did not provide the grounds on which it dismissed the complaint.

¶17 Majauckas filed motions for new trial and to alter or amend judgment to allow her to continue discovery on the tolling issue. She argued that Zall's counsel had erroneously persuaded the court that caselaw had eliminated temporary absences "from suspending the running of the statute of limitations." She contended that the court deprived her "of the opportunity to show that the statute [of limitations] was, in fact, tolled," and asked that the court grant her motion so that she could continue discovery. Specifically, Majauckas intended to obtain discovery from Zall's mother, with whom Zall lived, to determine whether she was in Arizona and could have received service when Zall was out of state, and to obtain discovery from Zall's father, whom Zall visited in California, to determine whether Zall could have been served there.

¶18 In his response, Zall argued that Majauckas did not know whether Zall could have been served during his absences. Zall asserted that whether he could be served "begs the question" because Majauckas had not filed the complaint until

the statute of limitations had run; therefore, the issue about whether he could be served while on vacation was moot.

¶19 The court denied Majauckas's motions for new trial and to alter or amend judgment. Majauckas timely filed her notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

¶10 On appeal, Majauckas argues that the court erred by 1) granting the motion to dismiss and holding that temporary absences from the state do not toll the statute of limitations; and 2) not converting Zall's motion to dismiss to a motion for summary judgment and not allowing Majauckas further discovery.

¶11 We review *de novo* an order dismissing a complaint as untimely filed. *Dube v. Likins*, 216 Ariz. 406, 411, ¶ 5, 167 P.3d 93, 98 (App. 2007). We take all the well-pled facts of the complaint as true. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7, 189 P.3d 344, 346 (2008).

¶12 We review a grant of summary judgment *de novo*; in doing so, we determine whether a genuine issue of material fact precluded summary judgment and whether the court properly applied the law. *Kosman v. State*, 199 Ariz. 184, 185, ¶ 5, 16 P.3d 211, 212 (App. 2000). We construe all facts in favor of the nonmoving party. *Id.*

¶13 We review for abuse of discretion orders denying motions for new trial and to amend or alter a judgment, and denying a party's request for further discovery. *Birth Hope Adoption Agency, Inc. v. Doe*, 190 Ariz. 285, 287-88, 947 P.2d 859, 861-62 (App. 1997); *Styles v. Ceranski*, 185 Ariz. 448, 450, 916 P.2d 1164, 1166 (App. 1996). A court abuses its discretion if it misstates the law in reaching its decision or if there are no facts in the record supporting its conclusion. *State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983); *United Imports & Exports, Inc. v. Super. Ct.*, 134 Ariz. 43, 46, 653 P.2d 691, 694 (1982). We will affirm the superior court on any basis supported by the record. *State v. Childress*, 222 Ariz. 334, 338, ¶ 9, 214 P.3d 422, 426 (App. 2009).

¶14 We conclude the issue in this case is not the interpretation of caselaw dealing with tolling the statute of limitations. Nor is the issue whether the court should have converted the motion to dismiss to a motion for summary judgment. Rather, the issue is whether Majauckas presented an issue of fact to preclude summary judgment and to allow additional time to conduct discovery to determine whether she could have served Zall within the statute of limitations period. Based on the record presented, we conclude the court did not err.

I. The Trial Court Followed the Law on Tolling the Statute of Limitations.

¶15 A.R.S. § 12-542(1) (2003) provides a two-year statute of limitations period for personal injury actions. This statute of limitations will toll only if a defendant is outside of Arizona and cannot be served. *Selby v. Karman*, 110 Ariz. 522, 524, 521 P.2d 609, 611 (1974); see A.R.S. § 12-501 (2003).

¶16 Majauckas filed her complaint four days after the statute of limitations had allegedly run. To save her complaint, she argued that 1) the court erroneously held that temporary absences do not toll the statute of limitations, and 2) Zall admitted he was out of Arizona for at least six days while the statute of limitations was running, which was enough to defeat the motion and allow discovery of whether Zall could have been served during that time period.

¶17 Contrary to Majauckas's argument, the court did not rule that temporary absences do not toll the statute of limitations. Rather, the court merely granted Zall's motion. As we discuss below, the court's ruling was correct because Majauckas's allegations that she may have been unable to serve Zall during the statute of limitations period did not create a genuine issue of material fact.

II. The Court Did Not Fail to Convert Zall's Motion to Dismiss to a Motion for Summary Judgment.

¶18 Pursuant to Arizona Rule of Civil Procedure 12(b), a court shall treat a motion to dismiss for failure to state a claim upon which relief can be granted as a motion for summary judgment if a party presents matters outside the pleadings that are not excluded by the court. *Allison v. State*, 101 Ariz. 418, 421, 420 P.2d 289, 292 (1966). The court must dispose of the motion "as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Ariz. R. Civ. P. 12(b); *Allison*, 101 Ariz. at 421, 420 P.2d at 292. We presume a trial court understands and applies the law correctly. *State v. Medrano*, 185 Ariz. 192, 196, 914 P.2d 225, 229 (1996).

¶19 Majauckas's response to Zall's motion included an affidavit, in which a paralegal attested to Zall's statements that he was absent from the state three times during the previous two years. The affidavit was a matter outside of the pleadings. In granting the motion, the court stated it considered Majauckas's response, and it did not say it had excluded the affidavit.

¶20 That the court merely granted Zall's motion without stating that it was a motion for summary judgment does not mean the court failed to convert the motion to one for summary

judgment under Rule 56. Rather, we presume the court knew the applicable law and treated the motion as one for summary judgment.

III. The Court Did Not Err in Granting Zall's Motion to Dismiss and in Denying Majauckas Further Discovery.

¶21 Majauckas's effort to save her personal injury claim falls short because 1) the allegations in her response and affidavit did not create a genuine issue of material fact that justified allowing further discovery to determine whether she could have served Zall when he was out of the state; and 2) she did not follow the proper procedure to ask for an extension of time for discovery.

A. Majauckas failed to raise an issue of material fact.

¶22 "[A]n opponent to a motion for summary judgment does not raise an issue of fact by merely stating in his affidavit that an issue of fact exists, but rather he must show that evidence is available which would justify a trial of that issue." *Feuchter v. Bazarro*, 22 Ariz. App. 427, 429, 528 P.2d 178, 180 (1974) (citing *Schock v. Jacka*, 105 Ariz. 131, 133, 460 P.2d 185, 187 (1969)).

¶23 As explained in *Selby*, the tolling provision of A.R.S. § 12-501 applies only if a defendant is outside of Arizona and cannot be served. 110 Ariz. at 524, 521 P.2d at 611. The Arizona Rules of Civil Procedure set forth the methods of

service available, including personal service (Rule 4.1(d)), service by leaving a copy of the summons and pleading at the prospective defendant's dwelling with a person of "suitable age" (Rule 4.1(d)), and personal service made out of state (Rule 4.2(b)).

¶24 Majauckas did not argue that a process server could not serve Zall during the days he was out of state; rather, she admitted that she did not know whether Zall could have been served. However, Majauckas could have served Zall's mother in Arizona, with whom Zall lived, or Zall at his father's home in California, where Zall stayed on vacation. Accordingly, unless Majauckas could show through further discovery that Zall or his mother could not have been served, summary judgment was appropriate.

¶25 Majauckas's proposed discovery alleged only that the tolling issue exists; she did not show that "evidence [was] available which would justify" the court's denial of summary judgment and allowance of further discovery on the tolling issue. See *Feuchter*, 22 Ariz. App. at 429, 528 P.2d at 180. Zall gave vague dates about when he left Arizona, and Majauckas's counsel did not ask him for the exact dates or ask questions that would show whether Zall could have been served while he was in California. Zall did not know whether his mother was home during the days he was out of state.

Furthermore, Majauckas's request to take discovery of the mother's vacation days from her employer was insufficient because even if Majauckas had determined the specific days when Zall's mother was unavailable to receive service, she could not show those dates coincided with the dates Zall was out of state. Moreover, Majauckas proposed no discovery about why service was not possible on Zall when he was in California.

¶26 Therefore, the court did not err in granting Zall's motion because Majauckas failed to create a genuine issue of material fact as to the tolling of the statute of limitations as required by *Selby*.

B. Majauckas did not file a motion or affidavit under Arizona Rule of Civil Procedure 56(f) to extend the time for discovery.

¶27 Pursuant to Arizona Rule of Civil Procedure 56(f), a party seeking an extension of time to conduct further discovery must file an affidavit setting forth the "particular evidence which is beyond the control of the affiant; where it is; what he believes it will be; the methods whereby the affiant intends to obtain it; and the estimated time required to acquire it." *Bobo v. John W. Lattimore, Contractor*, 12 Ariz. App. 137, 141, 468 P.2d 404, 408 (1970). Majauckas did not file a Rule 56(f) motion and affidavit. Therefore, Majauckas did not follow the proper procedure to ask for an extension of time to conduct discovery.

CONCLUSION

¶128 We conclude that the court properly granted Zall's motion. Also, the court did not abuse its discretion in denying Majauckas's motions for new trial and to alter or amend judgment, and her request to take further discovery.

/s/
DONN G. KESSLER, Presiding Judge

CONCURRING:

/s/
DANIEL A. BARKER, Judge

/s/
JON W. THOMPSON, Judge